equal amount of his goods, not the defendant's profit actually made, should be the measure of damages. Upon granting an injunction to restrain infringement, a court of equity will grant an accounting of the defendant's profits. This is a remedy entirely distinct from the giving of damages. *Lever* v. *Goodwin* (1887) 36 Ch. D. 1; *Leather Cloth Co.* v. *Hirschfield*, supra; *Henessy* v. *Wilmerding-Loewe Co.* (1900) 103 Fed. 90; Suth. on Dam., 3d ed., § 1201. It is purely equitable and is given on the theory of a constructive trust. *Addington* v. *Cullinane* (1887) 28 Mo. App. 238; Suth., supra. In an accounting of profits, the defendant's gain is the measure of recovery, and the plaintiff's loss immaterial; where legal damages are given, even in a court of equity, the plaintiff's loss is the only essential factor. That the two forms of recovery are entirely distinct the court seems to have overlooked. Even if the law were, as was held in *Graham* v. *Plate* (1871) 40 Cal. 593, on a mistaken analogy to confusion of goods, that the defendant's profits were a proper measure of damages, it is difficult to see how the principal case would be an improvement, for it would only substitute for what the defendant gained what the plaintiff did not lose.

Whether the measure of damages suggested might under certain circumstances be a proper one is a more difficult question. The facts in the principal case are perhaps of frequent occurrence. The defendant was a retail grocer selling the complainant's products as well as the infringing goods. Here the court might have found that the defendant would have sold the complainant's goods in almost every case in which the spurious goods were sold, if he had not also had the spurious goods on sale, and yet have found that the complainant's goods would not have been sold in every case except by the defendant's agency. Is the complainant entitled to recover for loss of profits which it could have made only by the defendant's voluntary act? Besides the incongruous result of taxing the infringer who also sells the genuine article for heavier damages than one who does not, the court would seem to be granting damages not caused by the unlawful act but only by the concurrence of an unlawful act and an additional lawful act. Might not the court refuse such recovery on the ground that the selling of the spurious did not cause the damage, and that the defendant's further act of failing to sell the genuine goods was entirely lawful?

CONTRACTS OF LABOR UNIONS IN NEW YORK.—The right of workingmen to organize and to co-operate in order to advance their interests is generally recognized. But there is the greatest uncertainty as to the extent to which such organizations may go in their competition with capital and with each other. The Court of Appeals of New York has taken the position that a union may refuse to allow its members to work with members of a rival union and may strike or threaten to strike if the latter are not discharged. In case the employer under this pressure actually discharges the men objected to neither they nor the organization of which they may be members have any right of action against the rival union or its members, provided no force is employed nor any unlawful act committed. *National Protective Assn* v. *Cumming* (1902) 170 N. Y. 315. See also *Wunch* v. *Shankland* (1901) 59 App. Div. 482.

Two recent decisions of the Appellate Division of the Supreme Court are of interest in this connection. In *Mills* v. *U. S. Printing Co.* (1904) 91 N. Y. Supp. 185, a non-union man sought an injunction restraining his employer from discharging, under its contract with a labor union, employees who refused to join such organization. The application was refused on the ground that a master, having the right to discharge his men for any reason or no reason, could not be enjoined because his special reason might be his agreement with the union. In another suit before the same tribunal, a rather remarkable result was reached. It was there held, by a divided court, that a contract between an employer and a labor union, providing that no help should be employed other than members of the union and that all non-union men should be discharged, constituted an attempt to restrict freedom of employment and was void as against public policy. In an action on a note given as collateral security for the performance of this agreement, the unlawful character of such a contract was held to be a sufficient defense. *Jacobs* v. *Cohen* (1904) 90 N. Y. Supp. 854. It would seem that if a master has the absolute and unrestricted right to hire and discharge his men as *Mills* v. *U. S. Printing Co.* suggests, he may, for proper consideration, contract away his volition in that respect. On the other hand, if we accept as the settled rule of New York the decision of Chief Justice Parker in the *Protective Assn.* v. *Cumming* that a labor union may strike or threaten to strike in order to secure exclusive employment for its members. it seems illogical to say that it may not contract to the same purpose. HIRSCHBERG, P. J., bases his opinion upon the spirit and reasoning of *Curran* v. *Galen* (1897) 152 N. Y. 33, and concludes that the contract here was unlawful because its purpose was to restrict freedom of employment on the part of both master and servant under penalty of loss of service on one hand and deprivation of employment on the other and to coerce all workingmen within the field of its operation to become and to remain members of the contracting organization. But *Curran* v. *Galen* is to be distinguished on findings of falsehood and malice—averments of which were lacking in the present instance—and must be limited to such facts in the light of the later decision of *Nat. Protect. Assn.* v. *Cumming*. The proposition therein announced by VANN, J, dissenting, that workmen cannot dictate to employers whom they shall employ, is denied absolutely by PARKER, Ch. J., who says, "so long as workmen assume all risk of injury that may come to them through the carelessness of co-employees, they have moral and legal right to say that they will not work with certain men and the employer must accept this dictation or go without their services," p. 324.

The advanced position of the New York Court of Appeals on the rights of labor unions was also recognized by HOLMES, J., dissenting, in *Vegelahn* v. *Gunter* (1896) 167 Mass. 92. His position is that the policy of the English law is to encourage competition, holding that it is worth more to society than it costs. Therefore the intentional infliction of temporal damage is justified when it is done not for its own sake, but as an instrumentality in securing the victory in the battle of trade. A prima facie tort is made out whenever an intentional injury can be shown; the defendant must then bring his conduct within one of the rules of privilege. Thus a labor union cannot justify its action in

forcing third parties to break their contracts because the plaintiff refused to recognize the union formally or offered an alleged insult to the walking delegate, *Beattie* v. *Callanan* (N. Y. 1903) 82 App. Div. 7, nor where they object to the employer's use of labor-saving machinery. *Hopkins* v. *Oxley Stave Co.* (1897) 83 Fed. 912. See 1 COLUMBIA LAW REVIEW 123; 2 id., 37, 400, 552.

THE RIGHT OF A LANDOWNER TO KILL GAME.—In a recent case before the Supreme Court of Arkansas it was held that the right of a landowner to kill game on his own land was a property right incident to his ownership of the soil, and that a law taking away this right was unconstitutional within the Fourteenth Amendment. *State* v. *Mallory* (Ark. 1904) 83 S. W. 955.

Originally it would seem that the right to kill animals ferae naturae was an unrestricted public or common right, belonging to all individuals as members of society, the game unreclaimed belonging either to no one or to the public. Bracton, B. II. Ch. 1, s. 2; Puffendorf, B. IV. Ch. 6; 2 Black. Com. 13th ed. 419, n. 10; *Geer* v. *Conn.* (1895) 161 U. S. 519. In England the right was exercised by all subjects over all unenclosed lands, whether commons, or private or royal estates. 2 Black. Com., supra; Select Pleas of the Forest (13 Publications Selden Society) cxxiii; Placita de Quo Warranto 601. Over enclosed lands this right could not be exercised, but in Select Pleas of the Forest, supra, cxxii, this restriction is said to have arisen, not by reason of a property right in the game in the enclosure inhering in land ownership, but by virtue of the landowner's right to prevent this, as any other trespass. On the public right to hunt royal authority early imposed a restriction by excluding the public from certain reserved areas, Canute, Secular Dooms, Cap. 81 (in Stubbs, Select Charters 74). These reserved areas were later greatly extended by the establishment of forests, covering private as well as the royal estates, having special laws, courts, and administrative officers, and by granting to private individuals franchises of chases, parks and warrens, under which powers and privileges were conferred similar in those of the forest, but not possessed at common law. 4 Coke's Inst. 289; Manwood, Forest Laws; Stubbs, Select Charters, Assize of the Forest, 156, 157, and pp. 296, 347; Magna Carta, 1 Statutes at Large 1; Charter of the Forest, 1 Statutes at Large 11; Select Pleas of the Forest, supra, Introduction; 1 Statutes of the Realm 4, 32. These franchises were not regarded as issuing out of the soil, 4 Coke's Inst. 318, but were personal grants and often extended over lands of which the grantee was not the owner. The restrictions and qualifications, with the old common law remaining, established the following rules as to wild game: The king was the owner, and though his ownership did not exclude the public from taking game, he might grant exclusive rights to it at his pleasure. Bracton, B. II, Ch. 1, s. 2; 2 Black. Com. 39, 410, 419; Manwood, Forest Law 7; but see 11 Co. 87; and 2 Black. Com., 13th ed. 419, n. 10. Privileged persons could prevent the taking of game, as a restraint on trespassers, and could acquire such rights as to living game that it became theirs when taken by a trespasser. Select Pleas of the Forest, supra, cxxii. Individual rights to game were ac-